

<sup>1</sup> Preliminary Order and Preliminary Order Nunc Pro Tunc at 1.

Pro Tunc has the words “**NUNC PRO TUNC**” typed below “**PRELIMINARY ORDER.**” Both orders stated:

Based upon the foregoing, that the date of accident being determined to be July 30, 2012, it is specifically determined that claimant failed to give notice within the provisions of the amended K.S.A. 44 2010 Supp 520 *[sic]*, requiring that notice be given within the prescribed period of time. Claimant's notice, if given, was clearly outside the 30-day requirement, as set forth in the statutes *[sic]*.<sup>2</sup>

Claimant asserts ALJ Howard failed to consider the entire record before entering his orders. Claimant argues:

The Administrative Law Judge Howard failed to consider certain evidence, specifically the deposition testimony of Santy Osorio, which was delivered to Judge Howard on August 23, 2013, the day after his Order dated, August 22, 2013, the Order of which this Appeal involves. A preliminary draft of such deposition was admitted during the August 20<sup>th</sup> hearing, but the six (6) exhibits were not attached to the preliminary draft. In response to the latter, Claimant's Attorney, John B. Gariglietti, requested the Court to leave the record open because such exhibits were not attached, but Claimant's request was denied by the Administrative Law Judge Howard.<sup>3</sup>

Claimant contends she gave timely notice of her injury by repetitive trauma to her supervisor, Santy Osorio, on July 2, 2012, by messaging her via Facebook.

Respondent asserts ALJ Howard indicated in the Preliminary Order and Preliminary Order Nunc Pro Tunc that he reviewed Ms. Osorio's deposition and concluded she was not a supervisor. Exhibits to Ms. Osorio's deposition were translated into English and discussed extensively during the deposition. With respect to the issue of timely notice, respondent asks the Board to affirm the Preliminary Order Nunc Pro Tunc.

The issues are:

1. Was the entire record considered by the ALJ before he issued the Preliminary Order and Preliminary Order Nunc Pro Tunc?
2. What is claimant's date of injury by repetitive trauma and did she provide timely notice to respondent?

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<sup>2</sup> *Id.* at 4.

<sup>3</sup> Claimant's Brief at 2.

**FINDINGS OF FACT**

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Three preliminary hearings were held in this matter. The preliminary hearings held on April 2, 2013, and July 23, 2013, were perfunctory in nature, as no witnesses testified and the parties entered into agreements on the disputed issues. A third preliminary hearing was held on August 20, 2013. The record reflects that the evidentiary depositions of three witnesses were taken at the request of respondent: Pragnesh Naik on June 17, 2013; Sally Naik on June 17, 2013; and Santy Osorio on August 14, 2013. At the August 20, 2013, preliminary hearing, the parties informed the ALJ that the three evidentiary depositions had been taken and asked the ALJ to consider the depositions before entering an order. Presumably, the parties also meant that the exhibits to the three depositions should also be considered by the ALJ before he entered an order. However, that was not specifically mentioned by the parties. The ALJ stated, "Record should reflect that the parties have taken several depositions that they're requesting I consider before entering an order."<sup>4</sup> The ALJ then recited the names of the three witnesses.

The Santy Osorio original deposition transcript has a file stamp indicating it was filed with the Division of Workers Compensation on August 26, 2013. The August 20, 2013, preliminary hearing transcript does not reflect that Ms. Osorio's deposition transcript was admitted as asserted by claimant. Nor does the August 20, 2013, preliminary hearing transcript reflect claimant's attorney requested the ALJ to leave the record open because the exhibits to Ms. Osorio's deposition were not attached or that claimant's request was denied by the ALJ. There is nothing in the record showing that Ms. Osorio's deposition transcript was delivered to ALJ Howard on August 23, 2013. However, as stated above, ALJ Howard in the Preliminary Order and Preliminary Order Nunc Pro Tunc indicated he reviewed Ms. Osorio's deposition and concluded she was not a supervisor.

Claimant testified she speaks only Spanish and that she began working for respondent as a housekeeper on April 8, 2012. She indicated that Ms. Osorio was her supervisor and also her interpreter, as she speaks both Spanish and English. Claimant testified that Pragnesh and Sally Naik were the managers. When claimant was hired, she was told by her friends that her supervisor was Ms. Osorio. Claimant testified that Ms. Osorio would train the new employees. Ms. Osorio would check the rooms after they were cleaned by the housekeepers. If a room was not clean in claimant's area, claimant would be directed by Ms. Osorio to clean that room.

After working about a month, claimant developed pain in her right arm. On July 2, 2012, using Facebook, she sent a message of having symptoms in her arm due to work

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<sup>4</sup> P.H. Trans. (Aug. 20, 2013) at 4.

to Ms. Osorio. Ms. Osorio directed claimant to see Dr. Andres, a chiropractor, and claimant did so on July 30, 2012. Claimant testified she told Dr. Andres that she thought the arm pain was work related. The day after the appointment with Dr. Andres, claimant took Dr. Andres' report to Mr. Naik. Claimant indicated she saw Dr. Andres two additional times and went to physical therapy. According to claimant, she received permission from Mr. Naik to miss work for the appointments. Claimant testified she told Mrs. Naik her right arm was swollen and hurting. Almost on a weekly basis, claimant, accompanied by Ms. Osorio, would report her arm pain to Mr. Naik.

Claimant acknowledged that she was hired by Mr. Naik, and if she wanted to take vacation time, she would have to ask Mr. or Mrs. Naik. After claimant was taken off work by Dr. Jorge Guillen, she spoke to Mr. or Mrs. Naik. When claimant wanted to return to work, she again spoke to Mr. or Mrs. Naik. At her discovery deposition, claimant indicated that she last worked on November 13, 2012. Claimant showed up to work on December 14, 2012, but was told she no longer had a job. Claimant testified that between November 13 and December 14, 2012, she was off work, taking medication and doing physical therapy.<sup>5</sup>

At the August 20, 2013, preliminary hearing, claimant introduced Facebook messages in Spanish between claimant and "Chikita Nava," the name Ms. Osorio used on Facebook. On July 2, 2012, Ms. Osorio posted a message on Facebook indicating that her arm was hurting because of work. Claimant responded by stating: "I have a lot of swelling in my arm. I think it's because of a lot of work."<sup>6</sup>

Pragnesh Naik, who goes by Peter, testified he was respondent's general manager and his wife, Sally Naik, was the assistant manager. Mr. and Mrs. Naik do not speak Spanish. Mr. Naik testified he and Mrs. Naik were the only supervisors. According to Mr. Naik, in October 2012, claimant brought a doctor's note and requested to be off work for two weeks for medical treatment. However, claimant indicated that her right arm was hurting, but not that it was work related. Prior to then, Mr. Naik asserts he was not told by claimant about an injury. After being off work for two weeks, claimant returned to work for one or two days. Mr. Naik indicated that he has been employed in the hospitality industry for 20 years and never had an employee report a work injury.

Sally Naik indicated she and Mr. Naik were claimant's supervisors and that Mr. Naik hired and fired employees. She also testified that Ms. Osorio spoke both Spanish and English. Mrs. Naik does not speak Spanish and used Ms. Osorio to direct the other employees, including claimant, what to do. Mrs. Naik indicated that prior to claimant

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<sup>5</sup> *Id.*, Resp. Ex. C at 39-40.

<sup>6</sup> *Id.* at 31. The July 2, 2012, Facebook messages are in Spanish and the interpreter at the August 20, 2013, preliminary hearing translated them into English.

bringing in a doctor's note in September or October 2012 claimant never complained of arm pain. Mrs. Naik testified that she was unaware claimant's medical problems were work related when claimant brought the doctor's note. Since Mrs. and Mr. Naik purchased the business in 2007, and while managers for respondent, no employee reported a work injury. Mrs. Naik was uncertain what to do if an employee reported a serious work injury and had no knowledge of what workers compensation insurance was designed to do.

Santy Osorio testified she is fluent in Spanish and she can speak and write in English. At the time of her deposition, she had worked for respondent for eight years. When Ms. Osorio began working for respondent there was a supervisor, Beatrice, who spoke Spanish and English. When Mr. and Mrs. Naik bought respondent, Beatrice left. After Beatrice left, Mr. and Mrs. Naik relied on Ms. Osorio to translate for the housekeepers. All of the housekeepers spoke Spanish and Ms. Osorio indicated they could speak a little English. Ms. Osorio has never been trained what to do if an employee reported a work injury.

Ms. Osorio testified she was not a supervisor, but was a team leader. She indicated she did not receive extra pay to be a team leader. She also testified:

Q. (Mr. Gariglietti) Now, did anyone ever call you a team leader?

A. (Ms. Osorio) One time when I started to check a room Peter talked to everybody who was housekeeping and told them I was checking rooms. They didn't have to get upset if I find something wrong and ask them to come back, so I guess it was Peter, but long time ago only to those people who was on that time.

Q. Those people, you mean which people?

A. The housekeeping.

Q. So during this conversation Peter told you that you were the leader of these people?

A. Yes, because I was checking rooms for them. He didn't -- okay. He didn't say, You are the team leader, but sometimes you don't have to say it, you know, in that way, you are a team leader. He talked to everybody I was checking rooms and it was my responsibility about the work of them, but he didn't say, You are the team leader, you are a supervisor, nothing like that.<sup>7</sup>

Ms. Osorio acknowledged that she had a Facebook account and used the name "Chikita Nava." She testified that she posted on her Facebook account on July 2, 2012,

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<sup>7</sup> Osorio Depo. at 28.

that she went to a chiropractor in an attempt to relieve pain in her arm. Claimant sent a reply that her arm was swollen and she thought it was from working too much.

Ms. Osorio testified that before claimant went to see the doctor in October 2012, they might have gone to see Mrs. Naik and told her of claimant having pain. Ms. Osorio was certain that after claimant saw the doctor in October 2012, she and claimant brought a doctor's slip to Mrs. Naik.

Claimant first saw Dr. Andres on July 30, 2012, and he diagnosed claimant with a right shoulder strain. His records have the words "Work Related" circled.<sup>8</sup> Claimant sought treatment for right shoulder pain from Dr. Guillen on October 31, 2012. Dr. Guillen's assessment was right shoulder and elbow pain. He prescribed Meloxicam and referred claimant for x-rays, but assigned no restrictions. X-rays of the right shoulder were normal. Claimant saw Dr. Guillen again on November 14, 2012. The doctor prescribed Meloxicam and Cyclobenzaprine and assigned her restrictions. His notes indicated claimant was thinking about no longer working as a housekeeper. Claimant saw Dr. Guillen a third time on November 28, 2012, and he prescribed Meloxicam. The doctor indicated claimant had seen a chiropractor who prescribed physical therapy. The doctor referred claimant to an orthopedic specialist.

Beginning December 10, 2012, claimant underwent physical therapy for her arm at Pura Vida Therapy, LLC. In a letter dated December 13, 2012, to respondent, physical therapist Allen Anthony Child indicated claimant presented with right elbow lateral epicondylitis and right shoulder impingement and resulting tendonitis. He also indicated those conditions were a direct result of repetitive stress of her employment. Mr. Child recommended restrictions of no right shoulder reaching, overhead and gripping and no lifting over 10 pounds.

Claimant saw Dr. Daniel J. Stechschulte, Jr., on January 8, 2013. His notes from that visit stated claimant reported a right shoulder injury believed to be caused by repetitive motion she did while cleaning. The doctor ordered a right shoulder MRI, which claimant underwent on April 8, 2013. The MRI revealed an intact rotator cuff and mild arthritic changes in the acromioclavicular joint.

#### **PRINCIPLES OF LAW AND ANALYSIS**

1. Was the entire record considered by the ALJ before he issued the Preliminary Order and Preliminary Order Nunc Pro Tunc?

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<sup>8</sup> P.H. Trans. (Aug. 20, 2013), Cl. Ex. 1.

In *Tresner*,<sup>9</sup> the parties agreed that claimant's discovery deposition was part of the record, but the deposition transcript was not contained in the Division of Workers Compensation's administrative file, nor was it filed with the Division. A Board Member remanded the matter to the ALJ, because the entire record was not considered before the ALJ issued the preliminary hearing order.

From the Preliminary Order and Preliminary Order Nunc Pro Tunc, it is difficult to determine what the ALJ considered to be the record. Neither order mentions the April nor July 2013 preliminary hearings. Nor do the Preliminary Order and Preliminary Order Nunc Pro Tunc indicate the exhibits to the three evidentiary depositions are part of the record. From the ALJ's orders, it is apparent he did review and take into consideration the three evidentiary depositions, including that of Ms. Osorio. While the orders discuss the exhibits to the preliminary hearing transcript, the orders do not refer to the exhibits to any of the evidentiary depositions.

This Board Member declines to remand this matter to the ALJ on these grounds for three reasons. First, Ms. Osorio was questioned at length about exhibits introduced at her deposition, which include a printout of Facebook conversations between Ms. Osorio and claimant. When the ALJ entered the orders, he was acutely aware of claimant's assertion that she gave notice of her work-related injury by repetitive trauma to Ms. Osorio via Facebook. Second, the Board has *de novo* jurisdiction and can decide this issue upon the entire record. Third, remanding this matter to the ALJ would not be judicially economical and would only delay a resolution of the issues presented by the parties. Therefore, the undersigned Board Member will not remand this matter to the ALJ solely because the ALJ may not have considered the entire record.

2. What is claimant's date of injury by repetitive trauma and did she provide timely notice to respondent?

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>10</sup> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."<sup>11</sup>

K.S.A. 2012 Supp. 44-508(e) states, in part:

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<sup>9</sup> *Tresner v. Harlow Aerostructures, LLC*, No. 1,054,390, 2011 WL 2693265 (Kan. WCAB June 16, 2011).

<sup>10</sup> K.S.A. 2012 Supp. 44-501b(c).

<sup>11</sup> K.S.A. 2012 Supp. 44-508(h).

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

- (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
- (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
- (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
- (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

This Board Member finds claimant's date of injury by repetitive trauma is November 13, 2012, the date claimant indicated she last worked for respondent. Under K.S.A. 2012 Supp. 44-508(e), November 13, 2012, is the earliest of the four occurrences that could trigger claimant's date of injury by repetitive trauma.

K.S.A. 2012 Supp. 44-520(a) states:

(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not

designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

The parties and ALJ concentrated on whether Ms. Osorio was or was not claimant's supervisor. This Board Member finds Ms. Osorio was claimant's supervisor and that claimant gave notice of her injury by repetitive trauma, via Facebook, to Ms. Osorio on July 2, 2012. In *Brown*,<sup>12</sup> notice was given by Brown to a lead winder, whom Fabpro did not consider a supervisor. The lead winder was considered by Brown to be his supervisor. A Board Member found the lead winder was claimant's supervisor. In *Huff*,<sup>13</sup> notice was given by Huff to her training instructor. The Board determined the training instructor was Huff's supervisor.

Neither Mr. nor Mrs. Naik spoke Spanish. Any instructions given by them had to be relayed through Ms. Osorio. Ms. Osorio considered herself a lead person and in turn, claimant considered her supervisor to be Ms. Osorio. Ms. Osorio would inspect cleaned rooms and instruct housekeepers to clean rooms that were not clean. That is the role of a supervisor.

Claimant gave notice to Ms. Osorio on July 2, 2012, through Facebook. Admittedly, that is before claimant's date of injury by repetitive trauma and is an unusual way to notify one's supervisor of a work injury. Nevertheless, claimant told Ms. Osorio of having swelling in her arm that she thought was caused by working too much. As stated by a Board Member in *Barrett*:<sup>14</sup>

Notice can be provided before a legal date of injury by repetitive trauma. [Footnote citing *Whisenand v. Standard Motor Products*, No. 1,056,966, 2012 WL 369779 (Kan. WCAB Jan. 23, 2012); see also the application of the predecessor statute in *Hunt v. Integrated Solutions, Inc.*, No. 1,046,939, 2010 WL 1918584 (Kan. WCAB Apr. 14, 2010) ("Admittedly, it seems unusual to conclude an injured employee gave

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<sup>12</sup> *Brown v. Fabpro Oriented Polymers, Inc.*, No. 253,707, 2000 WL 1277552 (Kan. WCAB Aug. 22, 2000).

<sup>13</sup> *Huff v. State of Kansas*, No. 1,032,230, 2013 WL 4779959 (Kan. WCAB Aug. 30, 2013).

<sup>14</sup> *Barrett v. Wal-Mart*, No. 1,059,815, 2012 WL 6811294 (Kan. WCAB Dec. 11, 2012).

notice of an accident that had yet to occur. Yet, that is a function of the legal fiction that results in cases of microtraumas and the terms of K.S.A. 44-508(d).”].] The notice statute does not require notice of injury after the legal date of injury, when claimant has already provided notice during the pendency of the series of microtraumas. Moreover, respondent had actual knowledge of the injury before the legal date of injury, so even if claimant was required to give notice after her legal date of injury, such requirement was waived based on prior actual notice.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>15</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>16</sup>

**WHEREFORE**, the undersigned Board Member reverses and remands the August 22, 2013, Preliminary Order Nunc Pro Tunc entered by ALJ Howard with directions to address the remaining issues raised by the parties and to specifically identify the record he considered.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December, 2013.

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HONORABLE THOMAS D. ARNHOLD  
BOARD MEMBER

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Honorable Steven J. Howard, Administrative Law Judge

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<sup>15</sup> K.S.A. 2012 Supp. 44-534a.

<sup>16</sup> K.S.A. 2012 Supp. 44-555c(k).